THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
APPLICATION OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, FOR AN ORDER AUTHORIZING THE RELEASE OF CERTAIN GRAND JURY MATERIALS	)	Civil Action No. 1:19-gj-00048 BAH

SUPPLEMENTAL SUBMISSION IN RESPONSE TO MINUTE ORDER OF OCTOBER 8, 2019

The Court's minute order of October 8, 2019, asked the Department of Justice to provide the Court, by October 11, 2019, additional information with respect to five topics. Those topics are: (1) whether grand jury information was provided to any foreign governments as part of Mutual Legal Assistant Treaty (MLAT) requests, and if so, the number of MLATs containing such information; (2) whether grand jury information was provided to any foreign governments pursuant to Rule 6(e)(3)(D), and if so, the number of times; (3) whether grand jury secrecy is the only basis for redaction for those parts of the Mueller Report where grand jury secrecy redactions were applied, and if not, what other bases for withholding apply; (4) the Department's basis for the redaction in paragraph four of the Weinsheimer Declaration; and (5) the basis for the Department's belief that Rule 6(e)(3)(D) does not authorize the Department to share the grand jury information with members of Congress.

The Department's responses are set forth below and in the attached Second Declaration of Bradley Weinsheimer.

1. No grand jury information collected from the Mueller investigation and protected from disclosure was shared with any foreign government as part of a MLAT request. Second Weinsheimer Decl., ¶ 2.

2. No grand jury information collected from the Mueller investigation and protected from disclosure was shared with any foreign government pursuant to Rule 6(e)(3)(D). Second Weinsheimer Decl., ¶ 2.

3. In a limited number of instances, grand jury redactions in the Mueller Report overlapped with other bases for withholding. Those additional bases include personal privacy, deliberations with respect to charging decisions, protecting ongoing law enforcement matters, and protecting information the disclosure of which would affect fair trial rights. The specific page numbers and bases for redaction are set forth in the Second Weinsheimer Declaration at ¶ 3. As explained in its filing of September 13, 2019, the Department has accommodated Congress's request to view the Mueller Report in unredacted form, with the exception of the grand jury information.

4. The information in paragraph four of the first Weinsheimer Declaration is appropriately redacted as reflecting matters that occurred before the grand jury. As Mr. Weinsheimer explains, the identity of grand jury witnesses is protected by Rule 6(e). *See Fund for Constitutional Government, Appellant, v. National Archives and Records Service, et al.*, 656 F.2d 856 (D.C. Cir. 1981) (finding that "naming or identifying witnesses" would reveal matters occurring before the grand jury and naming "potential witnesses" would reveal the strategy and direction of the investigation, which is protected under Rule 6(e)). Although the identification of who did not testify before the grand jury would not normally violate Rule 6(e), in the context of this matter, releasing the information at issue would

violate the rule. The Committee's request for certain FBI-302s contained a finite list of individuals. Identifying individuals who did not testify would necessarily reveal those who did testify. *See* Second Weinsheimer Decl., ¶ 4. This is the precisely the case in paragraph four of the first Weinsheimer Declaration. The Mueller Report, however, contains no redactions for the purpose of protecting the identities of those who did not testify before the grand jury. *Id*.

5. In June 2019, the Department set forth its position on why Rule 6(e)(3)(D) does not permit the sharing of grand jury information with members of Congress in response to a letter from Chairman Schiff of the House Permanent Select Committee on Intelligence (HPSCI). That letter is attached to the Second Weinsheimer Declaration at Exhibit A, and explains the statutory amendments that added this provision to Rule 6(e). *See generally* Second Weinsheimer Decl., ¶ 5 and Exh. A.

6. Finally, in the Department's filings of September 13, 2019, and October 8, 2019, the Department made clear that the accommodations negotiated with the Committee in June 2019 were in service of the Committee's oversight responsibilities. As explained further in the Second Weinsheimer Declaration, the Department continues to view that process and the continuing accommodation process as relating solely to that congressional oversight. *See* Second Weinsheimer Decl., ¶ 6.

Date: October 11, 2019

Respectfully submitted,

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Assistant Attorney General

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/s/ Elizabeth J. Shapiro
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SECOND DECLARATION OF BRADLEY WEINSHEIMER

I, Bradley Weinsheimer, declare the following to be true and correct:

1. I am an Associate Deputy Attorney General for the Department of Justice (Department). I respectfully refer the Court to my prior declaration in this case for my background and experience in connection with my work at the Department and my specific work in connection with the Mueller Report. I am personally familiar with the accommodation process between the Department and the House Judiciary Committee (Committee) that has occurred to date in connection with the Mueller Report. The information I provide below is based on my review of the Mueller Report; underlying documents; Special Counsel Office files; and information I have obtained from, among others, those who worked on the Russia investigation, including prosecutors, FBI agents and employees, and individuals in the Department's Office of Legislative Affairs.

2. I have determined that no grand jury material obtained during the Mueller investigation that is protected from disclosure was shared with any foreign government either as part of Mutual Legal Assistant Treaty (MLAT) requests or pursuant to Federal Rule of Criminal Procedure 6(e)(3)(D). I make this representation after an appropriate inquiry, including discussions with current and former government attorneys who worked on the Russia investigation or handled cases referred from the Special Counsel's Office,

FBI employees who worked on the Russia investigation or have access to the FBI's Russia investigation files, and an attorney in the Department's Office of International Affairs who processed Special Counsel Office MLAT requests; and a review of relevant Special Counsel Office files.

3. The redactions in the Mueller Report reflected some instances where information was redacted for multiple reasons. Subsequent to the Report's initial release, however, it was processed and re-released under the Freedom of Information Act (FOIA). That FOIA-processed version reflects all overlapping redactions. The FOIA-processed version of the Report reflects that grand jury information overlapped in six instances with other bases for withholding as specified in the chart below, identified in the form of FOIA redactions. Redaction under (b)(5) reflects deliberations with respect to charging decisions of uncharged individuals; (b)(7)(A) reflects ongoing law enforcement matters; (b)(7)(B) reflects information the disclosure of which would affect fair trial rights; and (b)(7(C) and (b)(6) reflect personal privacy.

Volume	Page	Other Exemptions in addition to grand jury information
1	176	(b)(7)(A), (b)(7)(B), (b)(7)(C), (b)(6)
1	194	(b)(5), (b)(6), (b)(7)(C)
1	194	(b)(5), (b)(6), (b)(7)(C)
1	199	(b)(5), (b)(6), (b)(7)(C)
1	199	(b)(5), (b)(6), (b)(7)(C)
1	199	(b)(5), (b)(6), (b)(7)(C)

4. Paragraph four of my first declaration identifies certain individuals who did and who did not testify before the grand jury. The identity of grand jury witnesses is

protected by Rule 6(e). Typically, the names of individuals who did not testify before the grand jury are not protected by Rule 6(e), and the Mueller Report contains no redactions for that purpose. But in the context of describing who did appear before the grand jury, identifying who did not testify would also identify grand jury witnesses by process of elimination. For example, the Committee is interested in a finite number of potential witnesses. Rule 6(e) prevents government attorneys from identifying which witnesses appeared before the grand jury. But if the government identified those witnesses who did not appear before the grand jury, then the Committee would know the remaining witnesses in fact appeared before the grand jury, and the government would thereby violate Rule 6(e).

5. The Department's position with respect to Criminal Rule 6(e)(3)(D) is reflected in a letter from Stephen Boyd, Assistant Attorney General for Legislative Affairs, to Chairman Adam Schiff, Permanent Select Committee on Intelligence, dated June 12, 2019. That letter is attached hereto as Exhibit A. The Department did not receive a substantive response to this letter.

6. Finally, as explained in the Department's filing of October 8, 2019, and its September 13, 2019 response to the Committee's Application, in early June, the Department agreed to provide to the Committee access to certain FBI-302s in order to accommodate its oversight responsibilities following the Committee's issuance of a subpoena in April and subsequent letter in May. As further noted in paragraph two of the Department's Tuesday filing, that agreement includes confidentiality provisions that significantly limit the use and dissemination of information that the Committee accesses. The Department has consistently viewed this agreement as part of the accommodation process in connection with the Committee's oversight activities. As the Court is aware,

subsequent to the filing of this application regarding Rule 6(e) materials, the Speaker of the House stated publicly that, in her view, the House of Representatives has now commenced an impeachment inquiry (in addition to its regular oversight responsibilities). To the extent the Committee now believes future productions in this process are part of that impeachment inquiry, that implicates very different issues for the Executive Branch as a whole—as set forth by the White House in its letter of Tuesday, October 8, 2019, to the Speaker and Chairmen of three committees. The Department and the Committee have not yet discussed whether they may need to amend the current agreement to ensure appropriate handling by the Committee in order for the accommodation process to continue as anticipated. The Department will work diligently with the Committee to resolve this issue and to continue a productive accommodation process.

I declare under penalty of perjury that the foregoing is true and correct.

10/11/2019
Date

Bradley Weinsheimer

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 12, 2019

The Honorable Adam Schiff
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Schiff:

We write in response to your request for an explanation as to why the Department of Justice ("Department") believes that the national-security exception to Federal Rule of Criminal Procedure 6(e) does not authorize disclosing to the House Permanent Select Committee on Intelligence ("Committee") grand-jury information developed in connection with the investigation of Special Counsel Robert S. Mueller, III.

The national-security exception, which is contained at Fed. R. Crim. P. 6(e)(3)(D), authorizes attorneys for the government, under defined circumstances, to share with specified officials grand-jury information that may bear on threats to our national security and other intelligence matters. We do not believe that this provision supports congressional access under these circumstances, and our conclusion is consistent with the courts' general approach to interpreting Rule 6(e), as well as with the Department's long-standing interpretation.

The Supreme Court has long "recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979). Congress has recognized this too, having enacted a rule of criminal procedure that prohibits the Department of Justice from disclosing any matter that occurs before a grand jury, subject to a few enumerated exceptions. *See* Fed. R. Crim. P. 6(e)(2). As the D.C. Circuit recently observed, "Federal Rule of Criminal Procedure 6(e) 'makes quite clear that disclosure of matters occurring before the grand jury is the exception and not the rule' and 'sets forth in precise terms to whom, under what circumstances and on what conditions grand jury information may be disclosed.'" *McKeever v. Barr*, 920 F.3d 842, 844 (D.C. Cir. 2019) (internal citation omitted). The Supreme Court has emphasized that Rule 6(e)'s exceptions should be interpreted narrowly. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983) ("In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand-jury] secrecy has been authorized."); *see also Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) ("Where Congress explicitly

enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

For decades, the Department has read Rule 6(e) to prohibit the disclosure of grand-jury materials to Congress in the oversight context. *See, e.g.*, *Congressional Subpoenas of Department of Justice Investigative Files*, 8 Op. O.L.C. 252, 269 (1984). Consistent with that understanding, Congress at times has proposed to amend Rule 6(e) to provide for congressional access, but it has never expressly done so. *See Legislation Providing for Court-Ordered Disclosure of Grand Jury Materials to Congressional Committees*, 9 Op. O.L.C. 86 (1985). Your request raises the question whether Congress implicitly provided for congressional access by adopting the national-security exception contained in Rule 6(e)(3)(D). We do not see any basis, in the text or history of the provision, to support such a reading.

In the years after the September 11, 2001 attacks, Congress established an exception to grand-jury secrecy that allows the Department to share grand-jury information that may bear on threats to our national-security and other intelligence matters. First, in the USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 203(a)(1), 115 Stat. 272, 279, Congress authorized the disclosure of foreign intelligence and counterintelligence information to "any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties." Fed. R. Crim. P. 6(e)(3)(D) (as amended). Second, in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6501(a), 118 Stat. 3638, 3760, Congress further authorized the sharing of grand-jury information involving "a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent." Fed. R. Crim. P. 6(e)(3)(D) (as amended). That information may be disclosed "to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities." *Id.* This exception was added in response to a recommendation by the 9/11 Commission that identified "the need for intelligence and law enforcement agencies to cooperate and share intelligence and law enforcement information." H. Rep. No. 108-724, pt. 5, at 175 (2004). This expansion of the national-security exception "was an effort to allow sharing of grand jury information in limited circumstances." *Id.* at 176.

We do not believe that either part of the national-security exception to Rule 6(e) authorizes the sharing with the Committee of grand-jury information bearing upon the Special Counsel's investigation. The two parts of the exception authorize disclosure to two different groups of individuals. The first part applies to disclosures of the specified information to "any federal law enforcement, intelligence, protective, immigration, national defense, or national security official." The text does not expressly identify Members of Congress, although Congress could very easily have included them had it intended to authorize access to Members in

connection with the performance of their "official duties." To the contrary, the enumerated categories all involve officials charged with significant executive responsibilities. As a class, Members of Congress would not be considered "federal law enforcement officials," "immigration officials," or the like. We similarly do not believe that particular Members of Congress become "intelligence officials" or "national defense officials" upon their assignment to committees with oversight responsibilities over those portions of the Executive Branch. As the Supreme Court has made clear, Rule 6(e)'s exceptions are to be narrowly construed, and we do not read Congress to have indirectly overturned Rule 6(e)'s preexisting limitation on the disclosure of grand-jury information to Members of Congress by enacting an exception for officials holding executive responsibilities.

The second part of the exception authorizes the sharing of information bearing upon specific kinds of ongoing "threat[s]" or "clandestine intelligence gathering activities" with any "appropriate" federal, state, local, tribal, or foreign government official, but only for "the purpose of preventing or responding to such threat or activities." The provision reaches individuals whose official duties permit them to "prevent[]" or "respond" to an ongoing "threat" or intelligence operation. It therefore extends to law-enforcement agencies and executive officials of various types, but it is not naturally construed as applying to a disclosure to a Member of Congress seeking information about historical events. While it could be said that Congress has authority to "respond" to an attack or other historical event, the disclosure provision's forward-looking and preventive nature is evident in its limitation to information about a "threat" of an attack, grave hostile act, or act of sabotage or terrorism; it does not expressly cover information about completed acts.

That conclusion is consistent with the national-security exception's notice provision, which requires Department attorneys to advise the relevant district court of any disclosure under the paragraph. The Department must advise the court of "the departments, agencies or entities to which the disclosure was made." Fed. R. Crim. P. 6(e)(3)(D)(ii). Congressional committees are plainly not "departments" or "agencies" for purposes of that notice provision. It seems equally implausible that Congress would describe its own Members or committees as "entities," and under the canon of *noscitur a sociis*, we would read "entity" to be similar in kind to the "departments" and "agencies" identified. Had Congress wished to overturn the Department's settled understanding of Rule 6(e), or had it wished otherwise to grant congressional committees access to grand-jury information, it would have spoken much more directly than it has done in Rule 6(e)(3)(D).

This analysis receives further support from the Supreme Court's interpretation of another Rule 6(e) exception in *Sells Engineering*. In that case, the Court gave a markedly narrow construction to the Rule 6(e)(3)(A)(i) exception authorizing the disclosure of certain grand-jury information to "attorney[s] for the government." Following the resolution of a criminal case, the Department had sought to share grand-jury information in connection with a False Claims Act suit, reasoning that the Department's civil-enforcement officials were "attorney[s] for the

government" who may therefore have access to grand-jury information. The Court rejected that conclusion, holding that Rule 6(e) permits disclosure without a court order *only* to persons who are members of the "prosecution team" and are carrying forward the criminal enforcement responsibilities of the grand jury. 463 U.S. at 429–31. The Department's interpretation of "federal . . . government official" in Rule 6(e)(3)(D) is consistent with the Court's reasoning in *Sells Engineering*.

Finally, even if Members of Congress could be included within the second sentence of Rule 6(e)(3)(D), the only authorized disclosures would be limited to information concerning "a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent." Such information would need to be shared for the purpose of preventing or responding to ongoing threats or intelligence activities. The exception would not extend to factual materials bearing upon an historical reconstruction of completed activities that do not bear upon a current effort to prevent or respond to an ongoing matter. Thus, this provision could not be read to authorize the disclosure of grand-jury materials in connection with the Special Counsel's investigation.

As you know, the Department takes very seriously future threats to our elections from foreign adversaries and is working diligently to combat those threats. While it is true that such threats could come from Russia, the Special Counsel investigated past events, not future threats. The national-security exception to grand-jury secrecy does not extend to the type of purely historical information you seek. Moreover, the public report, as well as the minimally redacted report that is available to your Committee, more than explains the evidence uncovered concerning Russian efforts to interfere in the 2016 presidential election, and there is therefore no national-security need to see grand-jury information that is protected by law from disclosure.

We hope that this information is useful to you. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Devin Nunes
Ranking Member